

National Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation

June 1, 2000

William A. Nitze
Assistant Administrator, U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

Dear Assistant Administrator Nitze:

This letter responds to your letter of May 24, which requested our views on a possible working group to be created by the Council to address “legitimate matters of interpretation of Articles 14-15.” The NAC provides our comments on the proposal below. We also take this opportunity to comment on the three decisions taken by the Alternative Representatives on Secretariat recommendations for factual records. (Although Bob Varney has reviewed and endorses these comments, the full GAC has not yet had an opportunity to review them.)

1. The Proposal for a Working Group

In our Advice No. 2000-2, dated May 15, 2000, we stated that “the U.S. government and the other Parties should not attempt to reach joint interpretations of issues concerning preparation of factual records (either on an ad hoc basis or through a working group), since any such attempt would necessarily infringe on the discretion the Agreement provides the Secretariat.” We also stated, as we have many times before, that the submissions procedure is too young to justify attempts by the Parties to reach interpretative rules that would restrict its ability to respond to unforeseen cases. And we urged in the strongest terms that the Parties “obtain public comment [through the JPAC] on these issues, *and in particular on the propriety of the Council’s considering them at all*, before any further substantive discussions among the Parties take place.”

We are greatly troubled that this advice appears to have been ignored. The Parties seem to be proceeding to set up a working group with a mandate broad enough to examine issues concerning the Secretariat’s preparation of factual records – precisely those issues that we believe should not be the subject of Council interpretations – and is doing so without providing time for the JPAC to obtain public comment on the proposal. **We must therefore recommend that the U.S. government postpone possible creation of this working group until the 2001 Council meeting, to allow time for the public and the Parties to consider alternative ways to address any legitimate concerns about the submissions procedure.** It appears that the proposal for the working group was put forward as the only solution from which to choose to resolve the current discord among the Parties concerning the submissions procedure. Proposing only one solution makes it much more difficult to consider other ideas. Therefore, we ask that a full and open discussion begin of a wide range of approaches to resolving these concerns.

As we stated in Advice No. 2000-2, we strongly believe that the best long-term approach to addressing such concerns would be for the Parties to discuss and institutionalize ways in which factual records could lead to cooperation and mutual assistance, building on the Parties' ongoing cooperation in enforcement matters and looking for inspiration to the CEC's experience with Article 13 reports. If factual records were perceived as tools of cooperation rather than of confrontation, we believe that the Parties' interest in micromanaging the procedure would be greatly reduced.

Nevertheless, we recognize that the Council is likely to consider creation of the working group at its June 2000 session despite our opposition. We will therefore provide specific comments on the proposal. Our starting points are three fundamental principles that have guided us before on issues concerning the submissions procedure: (a) the submissions procedure must not be unduly delayed; (b) the public must be able to participate in decisions concerning the submissions procedure; and (c) the Council must respect the discretion the Agreement provides the Secretariat. Below, we state attributes that the working group must have to be consistent with these principles. **We strongly recommend that the U.S. government not agree to any proposal that does not have these attributes.** We believe that they must be clearly established in the terms of reference of the working group.

a. Avoidance of delay. Our chief concern here is that referral of an issue to the working group not cause the submissions procedure to come to a halt while the working group considers the issue. **We therefore recommend that the terms of reference make clear that referrals of issues to the working group will not prevent the Secretariat and the Parties from continuing to carry out their respective roles in implementing the submissions procedure.**

b. Public participation. If the Council decides to create the working group this June, it should explain and take questions about the decision at its public session.

The concept paper states that a member of the JPAC would participate as an observer in the meetings of the working group and that the Council would make final decisions related to matters sent to the Working Group only after consulting with the public. We believe that both of these elements are important, but they do not go far enough to ensure full public participation. **First, the public (by which we mean all stakeholders) should have an opportunity to comment, through the JPAC, on issues proposed for referral to the working group before the Council acts on the proposed referral.** In this way, the public could comment on whether a referral was appropriate in the first place, not just on whether a proposed recommendation should be adopted. **Second, representatives from the countries' National and Governmental Advisory Committees should be allowed to observe the working group, together with a representative from the JPAC. And finally, the terms of reference should make clear that the public will have an opportunity to comment through the JPAC on any proposal from the working group before the Council considers whether to adopt it.**

c. Secretariat discretion. Our greatest concern about the working group is that it would become an instrument to micromanage the Secretariat's preparation of factual records, a function expressly provided to the Secretariat by the Agreement. We must reiterate our strong belief that,

as we stated in Advice No. 2000-2, “the Council would overstep its proper bounds and act in violation of the Agreement through detailed oversight of the Secretariat’s preparation of factual records.” For the submissions procedure to work, factual records must be prepared impartially. If the Parties try to influence the preparation of factual records, they will destroy the credibility and usefulness of the submissions procedure and thus undermine public confidence in the Agreement as a whole.

To avoid these possibilities, we believe that any working group must have the following characteristics. **First, the terms of reference must make clear that the Council will not refer, and the working group will not decide, issues whose decision by the Council would infringe on the Secretariat’s discretion, including in particular the Secretariat’s discretion in finding whether a submission meets the requirements of Article 14(1), in determining whether a submission merits a response under Article 14(2), in deciding whether to recommend preparation of a factual record under Article 15(1), and in preparing a factual record under Articles 15(2) and 15(4).** For example, the working group should not consider issues concerning submissions or factual records currently under consideration by the Secretariat, since such consideration would necessarily involve an attempt to influence the Secretariat’s consideration of the submission or factual record.

More generally, the working group should not try to tell the Secretariat how to carry out its discretionary functions. For example, we note that the concept paper states that the working group would examine and present to the Council “a typical procedure for the preparation of a factual record by the Secretariat.” For the reasons stated above and in Advice No. 2000-2, we believe that any attempt by the Council and the working group to adopt a “typical procedure” for preparation of a factual record would unacceptably micromanage areas the Agreement leaves to the Secretariat’s discretion, and as a result undermine the integrity and credibility of the submissions procedure. **We strongly believe that the Council may ask the Secretariat to prepare a “typical” or usual procedure for the Parties’ information, but may not instruct the Secretariat on what such a procedure may or may not include.**

Second, the terms of reference should make clear that the Council will refer issues to the working group only by consensus. This requirement should help to ensure that referrals are not made lightly, and are made only in accordance with the other elements we have stated. It is also in accordance with Article 9(6) of the Agreement.

Third, the terms of reference should allow the Council to refer issues concerning Part Five of the Agreement to the working group. There are many issues concerning areas of the Agreement other than Articles 14 and 15 that might benefit from increased attention. Allowing the working group to consider those issues would also reduce the chance that it will focus excessively on the submissions procedure. As a starting point, the working group should be tasked to develop the Model Rules of Procedure for dispute resolution under Part Five, which Article 28 requires the Council to adopt.

Fourth, the terms of reference should set a time limit on the working group. To ensure that the working group does not become a watchdog over the Secretariat, it should be

given a one-year term and instructed to complete its work within that time. Another Council decision would be necessary to renew the term.

2. The Alternative Representatives' Decisions on Factual Records.

While we are pleased that the Alternative Representatives finally took action on the three pending Secretariat requests for factual records, we are deeply concerned that the Council gave no reasons for denying the Secretariat's recommendation in SEM 97-003 and provided only minimal reasons for deferring SEM 97-006. The transparency that is so important throughout the implementation of the Agreement is crucial here. The Council must explain its decisions to overrule the Secretariat's judgment, so that the public can understand and debate the merits of the decisions. Without such an explanation, the Council's decisions will necessarily be perceived as arbitrary and biased, since Council members are inherently interested parties. **We therefore recommend that the U.S. government work to ensure that the Council publicly explain these and any future decisions to deny or defer recommendations for factual records.**

Similarly, we reaffirm our earlier statement that the text of Secretariat recommendations should be published at the time they are made rather than after the Council has acted. There is no legitimate reason for delaying publication of recommendations. Doing so decreases the transparency of the process, increases its delay, and undermines public confidence in it.

Finally, we understand that the second factual record prepared by the Secretariat, in SEM 97-001 (*BC Hydro*), has been submitted to the Council in draft and that the Parties have provided their comments on it under Article 15(5). **We strongly urge the U.S. government to encourage the Secretariat to submit the final factual record by the June Council meeting if at all possible, and to do all that it can to ensure that the Council authorizes the public release of the factual record at the June meeting.** In light of the Council's consideration of ways to oversee the Secretariat's preparation of factual records and the Council's decisions to deny and defer two recommendations, a Council decision to deny or even delay publication of a completed factual record would have a devastating effect on the public perception of the usefulness of the Agreement as a whole, and of the good faith of the Parties.

We very much appreciate your efforts to seek our views on these important issues, and we hope that you find this advice helpful.

Very truly yours,

John H. Knox
Chair, National Advisory Committee

cc: Robert Varney, Chair, U.S. Governmental Advisory Committee
Regina Barba, Chair, Joint Public Advisory Committee
Bill Andrews, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee